

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 7, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1487-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**CLOROX/MOORE'S FOOD PRODUCTS
and NATIONAL UNION FIRE
INSURANCE COMPANY,**

Plaintiffs-Respondents,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

Defendant-Appellant

BRENDA L. PEPLINSKI,

Defendant.

APPEAL from an order of the circuit court for Jefferson County:
JOHN ULLSVIK, Judge. *Reversed.*

Before Gartzke, P.J., Dykman and Vergeront, JJ.

PER CURIAM. The Labor and Industry Review Commission appeals from an order remanding this worker's compensation case to the agency. The issue is whether the commission's order was supported by sufficient evidence. We conclude it was. We reverse.¹

The commission found that applicant Brenda L. Peplinski suffered ninety percent permanent partial disability at the right wrist. Clorox/Moore's Food Products and National Union Fire Insurance Company ("the employer") sought judicial review. The circuit court concluded that the commission's determination was not supported by the evidence and remanded for further proceedings.

Judicial review of commission decisions is pursuant to § 102.23, STATS. We may set aside the commission's award if it depends on a finding of fact that is not supported by credible and substantial evidence. Section 102.23(6). However, the court may not substitute its judgment for that of the commission as to the weight or credibility of the evidence on any finding of fact. *Id.*

The commission relied primarily on the opinion of Dr. James Leonard. The employer argues that Leonard's opinion is insufficient evidence for the award because there was great evidence contrary to his opinion, and because Leonard initially had some doubt about Peplinski's disability. However, because we are not to weigh the evidence, the evidence opposing the commission's decision is irrelevant for purposes of judicial review. The commission noted that Leonard "had extensive contacts with the applicant for treatment and was familiar with the nature and onset of her condition." The fact that Leonard's ultimate conclusion differed from his initial view does not render his opinion incredible or insubstantial. It is the exclusive function of the commission to reconcile inconsistencies in witness testimony. *Ruff v. LIRC*, 159 Wis.2d 239, 245, 464 N.W.2d 56, 59 (Ct. App. 1990).

¹ This is an expedited appeal under RULE 809.17, STATS.

The employer argues that Peplinski failed to meet her burden of proof because the uncontroverted psychiatric evidence was that she is malingering. The commission stated:

The commission consulted with the administrative law judge concerning his assessment of the applicant's demeanor and testimony. The administrative law judge indicated that he found the applicant to be consistent and credible concerning the description of her ongoing restrictions and complaints in her right wrist. Further, the administrative law judge stated that he found nothing in the applicant's demeanor to suggest that she was malingering.

The employer cites no authority that the commission must accept an expert's opinion over its own evaluation of the applicant. We reject the argument. Therefore, we reverse the circuit court order remanding to the commission.

By the Court.—Order reversed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.